

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

)
Glen Johnson, et al,) File No. 14-cv-2081
) (PAM/LIB)
)
Plaintiffs,)
)
)
vs.) Saint Paul, Minnesota
) May 26, 2016
) 9:00 a.m.
Charps Welding & Fabricating,)
et al,)
)
)
Defendants.)

BEFORE THE HONORABLE RICHARD H. KYLE
UNITED STATES DISTRICT COURT JUDGE
(MOTIONS HEARING)

APPEARANCES

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LAMB
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P R O C E E D I N G S

IN OPEN COURT

THE COURT: Okay. The matter on the Court's calendar at this time is Justin Edward Wiley and others against -- I got the wrong docket sheet, sorry. Here we are. I'll get better after this -- Glen Johnson and others against Charps Welding and Fabricating and others, civil file number 14-2081. Let's start with the appearances for the Plaintiffs.

MS. COURT: Good morning, Your Honor. Amy Court on behalf of the Plaintiffs.

THE COURT: Good morning, Ms. Court. You're outnumbered, Ms. Court, do you realize that?

MS. COURT: It seems to be the consensus today. They're giving me a hard time.

THE COURT: For the Defendants.

MR. REVNEW: Good morning, Your Honor. Tom Revnew appearing along with my colleagues Martin Kappenman and Dan Wollin (phonetically spelled).

THE COURT: Good morning to all of you.

We're here on Motions for Partial Summary Judgment filed by both the Plaintiff and the Defendant, and I think I've sent out an e-mail to everybody saying we're going to start with the Defendants' motion, and the timeframe so

1 everybody understands what the rules are in that regard.

2 Okay. Let's get underway.

3 MR. REVNEW: Good morning, Your Honor.

4 THE COURT: Counsel.

5 MR. REVNEW: On behalf of the Defendants we
6 respectfully request that the Court grant our Motion for
7 Summary Judgment and dismiss the complaint in its entirety.
8 By background, Your Honor, the complaint in this case was
9 filed on June 23rd, 2014. There's been a couple scheduling
10 orders that have been issued. There's been a few Motions to
11 Compel. In fact, the last Motion to Compel was held in
12 December of 2015, December 9th, 2015, and at the time the
13 Plaintiffs filed that Motion to Compel, they waited four
14 months before filing that Motion to Compel to even complain
15 that they didn't get documents that they allegedly believe
16 that they were entitled to.

17 There has been exhaustive discovery in this case,
18 exhaustive discovery with regard to documents that have been
19 produced, and those documents include general ledgers and
20 other documents that lay out a whole host of financial
21 information. And despite all of the information, all the
22 documents that were produced by the Defendants in this case,
23 Your Honor, Plaintiffs took absolutely no depositions. For
24 two years they didn't take a deposition, despite the fact
25 that in our interrogatory answers the Defendant identified

1 witnesses who would have information, despite an initial
2 disclosure that identified witnesses, despite correspondence
3 that identified witnesses that were available with
4 information. In fact, Your Honor, they didn't even take the
5 deposition of the individual Defendant Ken Charpentier in
6 this case, nor did they take 30(b)(6) depositions of any of
7 the corporations at issue.

8 In sum, the Plaintiff fringe funds claims, they
9 lack merit, they lack substance, and they rely on
10 speculation, conjecture, and they misconstrue prior
11 deposition testimony from an unrelated case in North Dakota.

12 With respect to the claims that are at issue
13 before this Court, one claim that the Plaintiffs have
14 alleged is an alter-ego claim, and the Court should
15 summarily dismiss the alter-ego claim. In order to
16 establish an alter ego, in essence what Plaintiffs have to
17 establish is that the alleged alter ego, in this case C & G
18 Construction and Alpha, they have to establish that those
19 alleged alter egos are controlled by another. In this
20 instance that they are controlled by Charps, such to the
21 extent that they have independent existence in form only.

22 But in addition, Your Honor, to establish alter
23 ego they also have to establish that there was a subterfuge
24 here. That it was designed to defeat public convenience, to
25 justify wrong, or in fact to perpetrate a fraud. And with

1 regard to the alter-ego standard in the Eighth Circuit, the
2 Eighth Circuit is very clear that a corporation's existence
3 is presumed to be separate and may only be disregarded under
4 narrowly prescribed conditions, and the facts in this case
5 do not warrant setting aside the corporate existence of
6 Alpha or C & G or Clearwater Energy. In fact, the Eighth
7 Circuit and the cases in this circuit have essentially said
8 it is only when the control of the puppet company; i.e., in
9 this case Alpha or C & G, it's only when the control of
10 those puppet companies by the puppet master is used as a
11 subterfuge to defeat public convenience, justify a wrong and
12 perpetrate a fraud that liability can arise under the
13 alter-ego standard for ERISA purposes.

14 But importantly in this particular case, Your
15 Honor, in paragraph 52 of the Plaintiff's complaint, they
16 essentially allege that Charps and Mr. Charpentier operated
17 Clearwater Energy, C & G and Alpha to perpetrate a fraud.
18 So their focus is only on the element of fraud, and yet they
19 have absolutely no evidence to establish that there was a
20 fraud being perpetrated in this case.

21 In essence, there's no material facts at issue
22 here, Your Honor. With regard to the Plaintiffs, they
23 cannot establish the control element, nor can they establish
24 that Alpha, C & G, or Clearwater Energy lacked independent
25 existence.

1 The Plaintiffs' case essentially rests on a very
2 small amount of circumstantial evidence, and some of the
3 evidence that they rely on is so broadly painted it makes no
4 sense. But, in essence, here are some of the things that
5 they allege:

6 They allege that, well, the companies are in the
7 same industry. They are in the oil and gas industry. Well,
8 that doesn't establish control, the fact that two companies
9 are in existence in the same industry. In fact, if you
10 focus at what the companies actually do, they are distinctly
11 different.

12 With regard to Charps, Charps maintains and
13 repairs transmission pipelines. And these are large steel
14 pipelines that go across states. You have probably seen
15 them as you have driven on the expressways. These pipelines
16 can be 24 to 48 inches in diameter. Heavy steel pipelines.
17 And with regard to Charpentier or Charps, they work
18 primarily for one customer and that's Enbridge.

19 On the other hand, with regard to the alleged
20 alter egos, they work in a completely different segment of
21 the industry. They work in the oil fields and they build
22 and lay fiberspar gathering lateral midstream lines, which
23 are smaller pipelines, actually in the oil fields
24 themselves. And, in fact, much of their work is
25 polyurethane pipe and that polyurethane pipe can be a lot of

1 different dimensions, but 4 inches up to probably 36 inches
2 in diameter, but they are polyurethane versus steel. And in
3 fact with regard to C & G and Alpha, they are performing
4 work for the producers and companies such as Hess.

5 You're likely to hear from the Plaintiffs that
6 customers were not identified in discovery, and that's not
7 accurate. In fact, the documents that have been filed with
8 this Court specifically identify the customers with whom the
9 different entities performed work. They are identified
10 within the financial records, the consolidated financial
11 records that have been presented through affidavit
12 testimony.

13 In addition, with regard to the different
14 entities, the different companies, they actually hire out in
15 the field. So the hiring and firing takes place out in the
16 field. There's not centralized control of hiring and
17 firing, the centralized -- the hiring and firing is done by
18 the individual companies at the project sites.

19 The second issue that the Plaintiffs point to to
20 say, Well, look, Court, there's a lack of -- or there's
21 control over all the entities is the fact that Ken
22 Charpentier owns the different companies through his
23 ownership in Clearwater Energy. The problem with that, Your
24 Honor, the problem with that particular argument is that if
25 that were the case, there would never be a double-breasted

1 company, and every case that came before this Court where
2 there was common ownership you would automatically establish
3 alter ego, and that's not case law in this circuit.

4 In fact, it's broader than that, Your Honor. With
5 regard to the control, what the Courts are looking at is are
6 these companies separately managed. Is there separate
7 administration, which is much more telling than common
8 ownership.

9 And in this instance, each of the companies have
10 separate leadership. Greg Todavich runs Charps, Jeremy
11 Baker runs C & G and Alpha. And with regard to the
12 companies, they have their own separate human resources
13 department, they have their own separate payroll, they have
14 their own separate tax returns, they have their separate
15 unemployment compensation filings, they have their own
16 separate licenses to do business. All of that is separate.
17 And so focusing solely on common ownership is nonsensical.

18 Another factor that the fringe funds focus on in
19 this particular case is, well, the Clearwater companies have
20 headquarters in the same building up in Clearbrook,
21 Minnesota. The problem with that argument is they ignore
22 the fact that the companies all have separate suites under a
23 lease arrangement. They also ignore the fact that when you
24 start looking at the companies in a much broader sense, they
25 have a lot of different offices and job sites.

1 So as an example, Alpha, one of the Defendants,
2 leases office space in four different locations. Charps
3 leases space in seven different locations. C & G leases
4 space in eleven different locations. Clearwater Energy
5 leases space in three different locations. So they focus on
6 one scenario where they share space in a building in
7 Clearbrook and yet ignore that these companies have office
8 spaces in a lot of different states.

9 In fact, when we start looking at the specific
10 companies, Charps Welding performed work in eleven different
11 states. Minnesota, Illinois, Michigan, North Dakota,
12 Wisconsin, Indiana. They formerly did work in Kansas,
13 Pennsylvania, Ohio, New York, Oklahoma. Alpha performed
14 work in two states, North Dakota and Montana. And then
15 C & G is in Oklahoma, Pennsylvania, New York. Kansas in the
16 past, Missouri in the past, Vermont in the past, Texas in
17 the past. Seven different states.

18 And yet the Plaintiffs want to ignore the fact
19 that these companies are performing work in different
20 states. They want to ignore the fact that not only are the
21 companies doing work in different states, when it comes to
22 the oil and gas industry, they are performing the work in a
23 different segment of the industry.

24 The other thing that the Plaintiffs point to is
25 that, Well, there have been a few people who have provided

1 services that have been shared across the company. What
2 they can't dispute is that these are outlier scenarios where
3 it is the overwhelming evidence establishes that the
4 companies manage their own affairs. They will point to,
5 Well, you know, some of the employees have worked for more
6 than one Clearwater company, but yet they can't dispute that
7 almost all of the employees who work for the companies at
8 different times actually terminated their employment, left,
9 and then went to work for another company.

10 In fact, Your Honor, it's no different than an
11 employee working for Krause Anderson Construction, quitting
12 their job at Krause Anderson Construction and then going to
13 work for Knutson Construction across the street. Two
14 distinctly separate companies. Just the fact that they had
15 employment at the two companies is not enough.

16 Additionally, Plaintiffs will argue, Gee, you
17 know, if you look at the companies, they shared equipment.
18 But the only thing that they can point to is the fact that
19 the companies shared some printers and some papers up at
20 corporate headquarters in Clearbrook, and that's di minimus
21 when you start to think about the tools and the equipment
22 that are used in the oil and gas industry with regard to the
23 big pieces of equipment that are being used on the job
24 sites. In fact, they can't dispute that the companies
25 really do not share tools and equipment and materials to

1 perform the work. In fact, one has to question how could
2 they share equipment when they are in different states
3 altogether.

4 You'll also hear some issues with regard to the
5 companies use some of the same banks. In fact, I think
6 their briefs even say that they used the same bank accounts,
7 which is misleading. There's absolutely no evidence to show
8 that the individual companies had the same individual bank
9 accounts. They may have had accounts at the same bank but
10 they are separate accounts.

11 With regard to another argument that you will hear
12 that they will make is that the companies shared a worker's
13 compensation insurance policy and that for one year they
14 shared a vehicle insurance policy, and yet they can't
15 dispute that that was required by the insurers. It wasn't
16 the company's decision; and regardless, it does not
17 establish control, whether directly or indirectly.

18 Going back to the customer issues, as I said
19 before, the companies performed work for different customers
20 in different segments of the industry. C & G at one point
21 did a very miniscule portion of work for Enbridge, which
22 Plaintiffs' counsel will likely point out. Except for the
23 fact that if you take a look at the 2012 financial report,
24 which is Exhibit 16 to Joe Van Vynckt's affidavit, it
25 indicates how miniscule the work C & G did for Enbridge was

1 as compared to the amount of work that Charps did.

2 Regardless, other than this one instance, they
3 can't dispute that Alpha never shared a customer with
4 Charps. They can't dispute that C & G performs work for a
5 whole host of other clients. They can't dispute that the
6 work that C & G and Alpha did does not compete with the
7 Charps work because they are in completely different
8 industries or segments of the industry.

9 In fact, Your Honor, they can't even dispute the
10 fact that when it comes to bidding for the work and
11 contracting for the work, that that is completely separate.
12 Each company has their own bidding department, bidding on
13 work. And that's completely separate. In fact, the signing
14 of the contracts is done separately by the presidents of the
15 different companies.

16 And they will say, Well, you know, Charps provided
17 a few loans to Alpha and C & G. They can't dispute that
18 those loans were not regular occurrences and that the
19 companies do not share finances. They can't dispute that
20 the loans were not risky, or that they were in fact
21 fraudulent. In fact, they didn't leave Charps uncappedalized
22 and insolvent. And the fact that there were loans simply
23 doesn't indicate that Charps controls Alpha or C & G.

24 In fact, there are cases in this district,
25 *GreenWorks* is one particular case, wherein the *GreenWorks*

1 case the Court even recognized that there were loans going
2 back and forth between the companies and that did not
3 establish alter-ego status.

4 The bottom line, Your Honor, when it comes to the
5 control factor, each of the companies are independent
6 businesses. They service different areas of the industry.
7 They are in different supply chain segments. One's in
8 production, one's in distribution. They operate in
9 different regions of the country. They operate performing
10 different work for different clients. They bid for
11 themselves. They buy their own tools and equipment. They
12 do their own hiring and firing and discipline. They have
13 separate financials. And as a result, they cannot establish
14 that there's control amongst the alleged alter egos.

15 There's a second component, Your Honor, that they
16 need to establish, though, as well. In addition, they have
17 to establish that there was some fraud that took place here.
18 And in the *GreenWorks* case the Court noted that it's best to
19 review the loss of independent existence to another's
20 control with an element of wrongdoing to show some
21 inequitable result. And that's not what happened here and
22 the Plaintiffs cannot establish fraud.

23 By background, C & G and Alpha were in completely
24 different segments of the industry. From a historical
25 standpoint, C & G got its name because there were two

1 individuals that decided to create C & G, Ken Charpentier,
2 which is the C, and then the G was Greg Todavich, and both
3 of those individuals contributed an equal amount of money to
4 set up C & G, \$160,000. And C & G when it was set up, it's
5 undisputed when they were set up it was set up to perform
6 work in North Dakota and Montana in the gas lines, which is
7 the polyurethane pipes. There's no element of fraud of the
8 creation of C & G.

9 With regard to Alpha, Alpha was created by three
10 individuals: Kris Munter, Ken Charpentier and Ed
11 Charpentier. And at the time that Alpha was coming into
12 existence, the original intent was that there were going to
13 be two owners, Kris Munter and Ed Charpentier. And those
14 two individuals, when Alpha was created, gave personal
15 guarantees. They mortgaged their homes. They bought and
16 paid for a million dollar life insurance policy.

17 THE COURT: That's sort of saying you're over your
18 time.

19 MR. JOHNSON: Thank you, Your Honor. I was
20 looking for the --

21 THE COURT: We don't have lights here, so...

22 MR. JOHNSON: Okay. Thank you.

23 THE COURT: Counsel.

24 MS. COURT: Thank you, Your Honor. The
25 Defendants' counsel spoke a lot about discovery in this case

1 and I think it's a relevant inquiry given some of the
2 discovery orders. But with respect to the deposition
3 situation, cases like this are generally very fact specific
4 and in this case the Trustees were denied a specific amount
5 of documents at this stage of the proceedings. The
6 Trustees' position is that depositions without documents are
7 not necessarily reliable because they don't have information
8 to impeach the witnesses.

9 Now, what we do have here is inconsistent written
10 discovery, and the Defendants have said, Well, if you would
11 have taken depositions you would have found out that that
12 discovery isn't consistent. That violates the Federal Rules
13 of Civil Procedure and it violates Magistrate Brisbois'
14 orders in that the Defendants were ordered to provide
15 correct responses to some of the Trustees' discovery.

16 The Defendants in this case have taken
17 approximately eight or nine depositions. They did not use
18 any in support of their motion.

19 In addition, if the Trustees are entitled to
20 proceed on their right to audit claim, the Trustees will
21 take depositions and it is not a financial -- a good
22 financial decision for the Trustees to take multiple
23 depositions at multiple times throughout the same
24 proceeding.

25 With respect to the alter-ego claim, the Trustees

1 believe if they are required to establish at this stage in
2 the proceeding the alter-ego claim, and the joint venture
3 claim on their dispositive motion, at minimum there are
4 multiple issues of fact. The Defendants argue they have
5 completely different business purposes, but they all perform
6 pipeline installation work. They all provide gathering
7 systems work. They all provide restoration services,
8 emergency response work, facilities use, and systems
9 maintenance.

10 The Defendants admit that employees have worked
11 for one or more entities at a time. If their business
12 purposes were so separate, it would be difficult for an
13 employee to go move around with the companies.

14 The employees or the corporate entities all
15 perform work in Minnesota. Charps Welding and Alpha Oil
16 worked in North Dakota. Charps and C & G worked in
17 Oklahoma, Kansas, Pennsylvania, New York, and Missouri.

18 In the Trustees discovery they requested
19 identification of all employees, together with their primary
20 job responsibilities, and all documents evidencing the type
21 of work that the employees for all corporate defendants
22 performed. Magistrate Brisbois denied that discovery on the
23 basis that it was not related to the Trustees' right to
24 audit claim. Without those documents the Trustees can't
25 test the veracity of Defendants' statement or impeach

1 testimony saying that is just a limited circumstance, or
2 they only worked at one company at a time.

3 The Defendants allege they didn't share any
4 customers, but they do admit that Charps and C & G both
5 worked for Enbridge, and Enbridge was Charps only customer.
6 I think it was actually usually their only customer, their
7 biggest customer. And, C, the construction Alpha, both
8 performed work for Oneok and Hess and several other
9 companies.

10 Office space is shared. With respect to the
11 management of the companies, the Defendants allege that
12 Mr. Charpentier delegates management to companies other than
13 Charps Welding, but it's true he does possess an ownership
14 interest in all of the corporate defendants, and
15 Mr. Charpentier has testified that he has final authority
16 with respect to Alpha. And the Defendants take issue with
17 the context of that testimony. But the Trustees submit that
18 that context is why it's reliable. Mr. Charpentier had no
19 reason to lie in that deposition.

20 The Defendants agree that they all have bank
21 accounts at the same bank. But what they didn't tell you is
22 these independent leaders of the other companies don't have
23 check signing authority on the accounts for the business and
24 payroll purposes, but Mr. Charpentier and his wife do.

25 The Trustees also requested identification

1 regarding supervisors for each of the corporate Defendants;
2 but again, Magistrate Brisbois denied that discovery request
3 on the basis that it wasn't related to the Trustees' right
4 to audit claim.

5 The Defendants have also -- or the Trustees also
6 requested employee files and employee information to
7 determine the extent to which the employees were being
8 transferred between companies. That information was not
9 ordered to be produced.

10 One of the things that a Court is to look at when
11 construing an alter-ego claim is whether or not the
12 transactions between the companies are at arm's length, and
13 in this case we know employees were going back and forth.
14 We know there was shared equipment. We know there were loan
15 transactions. This is all set forth on their consolidated
16 financial statements.

17 What we don't know is whether or not these
18 transactions were at arm's length because no documents
19 evidencing the basis or the terms for such transactions were
20 produced in discovery. The Defendants have represented that
21 they have produced all of their documents that they were
22 required to produce, so the fact that it hasn't been
23 produced leads to the conclusion that they don't exist.

24 Over the audit period at issue in this litigation,
25 Charps Welding equity increased over 8,000 percent while the

1 other corporate defendants decreased to a negative amount.
2 They're dependent on Charps Welding to remain financially
3 solvent. That's evidenced by the significant outstanding
4 loan obligations that the other entities have with Charps
5 Welding; and again, there are no documents that support
6 these loans or identify the terms and whether they're at
7 arm's length.

8 And the Defendants admit that they
9 cross-collateralized all of their assets. These things
10 relate to the first prong of the alter-ego test. There is a
11 second prong to the alter-ego test, as this Court is aware.
12 Magistrate Brisbois did not permit discovery into this
13 prong. Magistrate Brisbois did construe the discovery
14 request under the *General Contractor's* test, which is the
15 test applied in the Eighth Circuit. And if you look at his
16 initial order, he did not order any discovery as relevant to
17 the second prong of the alter-ego test. So the Trustees
18 have not been able to do discovery on that particular prong.
19 Even so, the Trustees believe there are significant numbers
20 of issues of fact that would preclude summary judgment on
21 behalf of --

22 THE COURT: Was there an appeal from that portion
23 of Judge Brisbois' --

24 MS. COURT: We did appeal it.

25 THE COURT: And what happened?

1 MS. COURT: You affirmed it.

2 THE COURT: That's behind us then.

3 MS. COURT: It is. I will also submit that the
4 Defendants' reliance on this *GreenWorks* case is inapposite.
5 The Charps companies are significantly larger and have very
6 complex corporate structures. The GreenWorks companies were
7 a husband and wife company that operated out of their home,
8 and at this point all of the GreenWorks entities are in
9 Chapter 7 bankruptcy.

10 The Defendants didn't touch on this in their oral
11 argument, but it was brought up in their brief and so I will
12 just touch on it briefly. It is the personal liability of
13 Mr. Charpentier. They have moved for summary judgment
14 alleging that he has no personal liability. The Trustees
15 dispute that. The participating agreements that he signed
16 are clear, unequivocal personal guarantees. I will also
17 point out that Judge Davis has construed the exact same
18 participating agreement at issue here and he found that it
19 was a valid personal guarantee.

20 And in that case -- that was in the *Arrowhead*
21 case, but he also found that employers, individual employers
22 have an interest in the performance of the principal
23 contract and so they are not a gratuitous guarantor.

24 THE COURT: But you agree that I'm not bound by
25 Judge Davis's decision?

1 MS. COURT: I would agree, but I think his
2 reasoning was very sound.

3 Do you have any other questions?

4 THE COURT: No.

5 MS. COURT: Thank you.

6 THE COURT: I think you're up again, though.

7 MS. COURT: Oh, we're moving on. I was ready to
8 rest for a minute.

9 THE COURT: You got 30 seconds. That should do
10 it.

11 MS. COURT: All right. On the Trustees' motion,
12 the Trustees have not moved for full summary judgment. They
13 have moved for partial summary judgment on what has been
14 defined in this case as the threshold issue of whether or
15 not they have a right to conduct the audit of all of the
16 corporate defendants.

17 What Judge Brisbois did not say was that there has
18 to be a dispositive ruling on the alter ego and the claims
19 in order to proceed. He said there must be a threshold
20 showing, and that threshold showing must be reviewed in the
21 context of ERISA and the governing documents, the CBAs and
22 the trust agreements. The Trustees believe, based on the
23 evidence that we have been talking about, that there is a
24 threshold showing. The Trustees had employees come forward,
25 identify the information leading to a potential alter-ego

1 joint venture claim. In accordance with their fiduciary
2 duties and their governing documents, the Trustees filed
3 this lawsuit.

4 The Trustees have the right to audit as reasonably
5 required in the administration of the trust fund. That's
6 under some of the contracts. There are other contracts that
7 say that the Trustees had a right to audit under -- where an
8 employer is performing work under a joint venture or under
9 the name of another, all of that work is covered.

10 In this case the Trustees should have the right to
11 make basic determinations regarding whether the Defendants
12 are distinguishable as employers, as a matter of fact in
13 law, to make a determination of how much work between the
14 Defendants was covered by the CBAs, how much work was being
15 performed under the name of another.

16 There are also important policy reasons under
17 ERISA to permit these types of claims. It requires
18 contributing employers to make their contractually defined
19 benefits contributions. It stops employers from earning an
20 unearned competitive advantage, and it stops employers from
21 circumventing contribution obligations through use of other
22 entities.

23 I would also like to point out that at the initial
24 discovery stage, Magistrate Brisbois made a finding that
25 there was only the Builders Agreement in the record and the

1 Builders Agreement covers the State of Minnesota. He
2 therefore denied discovery for any work performed outside
3 the State of the Minnesota.

4 All of the agreements that are in the record
5 before the Court here today were in the record before
6 Magistrate Brisbois. The distribution and utilities CBAs
7 and the pipeline CBAs are nationwide, so the Trustees
8 request that they be permitted to conduct their audit based
9 on all work covered by all of the various Collective
10 Bargaining Agreements. Thank you.

11 THE COURT: Okay.

12 MR. KAPPENMAN: Good morning, Your Honor. Since
13 we have switched motions, you get a switch of attorneys.
14 I'm Martin Kappenman.

15 THE COURT: You may want that podium up a little
16 bit. Right on the front ledge there's a button someplace.
17 There you go.

18 MR. KAPPENMAN: I think the most important place
19 to start is to remember why they would be enabled to audit
20 Alpha and C & G. These are non-union entities. So with
21 respect to Charps they have conducted audits. Charps hasn't
22 resisted audits. What they want is the right to audit
23 non-signatories. Well, what Judge Brisbois reasonably
24 determined, and what you affirmed when it was appealed to
25 you, is, Well, if you want to audit, if you want to audit

1 non-signatory employers, you're going to have to show
2 threshold claims. And what those threshold claims are are
3 the other counts of their complaint. Alter ego and joint
4 venture.

5 So what that does is it puts us back in the
6 framework of, Well, did they show alter ego and joint
7 venture. As Mr. Revnew pointed out in his oral arguments,
8 and as we've argued extensively in our briefs, they simply
9 haven't. They don't have the basis for those claims.

10 So let's start with one of their favorite facts
11 that they point out repeatedly in their motion papers, and
12 again today at oral argument. It's this 8,000 percent
13 increase in equity of Charps. I'm glad they pointed it out
14 because had they not lead with it, I would have led with it
15 in our argument. Because what are these alter ego and joint
16 venture cases about. They are about unionized entities.
17 Unionized entities that let the unionized side of the
18 company wither on the vine while they shuttle work over to
19 the non-union companies.

20 Here there's no evidence of that. That fact
21 alone, the huge increase in the equity of Charps totally
22 undermines all of their claims. Because what we have here
23 is a robust, growing, profitable Charps who is employing
24 lots of union members. It makes no sense that the pension
25 fund is trying to somehow squash that. It goes contrary to

1 what any intent of an alter ego or joint venture analysis
2 for some fraud or improper purpose would find.

3 So let's talk -- shift over to some of the
4 discovery issues. So with respect to the discovery,
5 Brisbois' order was clear. They could look into and seek
6 discovery on alter ego and joint venture. They simply chose
7 not to do so as fulsome -- take as fulsome discovery as they
8 could under those analyses.

9 Ms. Court points out today that these sorts of
10 inquiries are very fact specific. Well, as the Court is
11 well aware, the way to determine to get really into the
12 details of a fact-specific inquiry is to hold depositions.
13 They took none.

14 I think the fact that they decided to use as one
15 of their primary sources of evidence upon which they base
16 their motions in this case, their resistance of our motion
17 and the affirmative insistence on their motion, was in fact
18 deposition testimony. I think that highlights the fact that
19 what you have here are Plaintiffs who made an incorrect
20 strategic choice not to take depositions.

21 So what they do is they grab the depositions from
22 that old case, unrelated to the issues in this case. But
23 what I want to point out is how wrong they get the facts in
24 those depositions. So they point out time and time again,
25 Well, Mr. Charpentier in here says Alpha is nonunion, Charps

1 is union. He did say that. But on the, you know, when the
2 depositions are printed four on a single page, if you just
3 jump to the other side of the page he continues in response
4 to questions to highlight all of these distinctions that
5 we've pointed out today here. How they really do different
6 types of work. How they have these different origins. All
7 of this is different.

8 Which leads me to another point. They've claimed
9 that what we have here is self-serving affidavits and
10 declarations that the Court should ignore. Well, what even
11 the cases they cite, and the understood case law in this
12 area is, Yeah, all declarations and affidavits are to some
13 extent going to be self-serving. Why else would we submit
14 them? You can only not use them if they directly contradict
15 sworn deposition testimony. That's not the case here. They
16 cite no deposition testimony that these declarations are
17 working against.

18 So then we get back into the interrogatories and
19 the basics of that discovery process. First of all, they
20 were given a mountain of information. They didn't get
21 everything they wanted but they got a mountain of
22 information with respect to documents and other financial
23 information.

24 With respect to the general ledger, in their
25 briefs they said, Well, they still didn't give us their

1 general ledger, but we did. What they don't like is Judge
2 Brisbois' definition of what the general ledger is and the
3 language, we complied with his ruling. Again, what you see
4 time and time again throughout these motion papers is an
5 attempt to relitigate those discovery issues and to say,
6 Well, because we lost that, that's really why we don't have
7 what we need here. Almost a concession that they don't have
8 what they need to get their audit in this case.

9 With respect to the personal liability of
10 Mr. Charpentier which was referenced in Ms. Court's
11 arguments, first of all, necessarily, if the alter ego and
12 joint venture claims go our way, well, there's no personal
13 liability to be had because that's the basis of their
14 claims. There's no claim in this suit that Charps failed to
15 pay the pension fund contributions that were due and owing.
16 It's all about these other companies. So if those fail,
17 necessarily the personal liability claim fails, too.

18 I would also reference *Operating Engineers versus*
19 *Listful*, 220 F. Supp.2d 1042. We've got the same sort of
20 language and it goes on to hold, Well, if it's intended to
21 be personally bound, he should have signed as an individual,
22 which we don't have here. But again, Your Honor, since we
23 don't have alter ego and we don't have joint venture,
24 necessarily the personal liability claim also fails.

25 I want to talk about the depositions that we took.

1 While they are in the record, they are an attachment to our
2 declaration. We made sure that they are still in there, so
3 if you'd like to take a look at them you can.

4 But why aren't they referenced heavily in our
5 motion papers? Because we don't need to rely on those.
6 Because when it comes down to it, the Plaintiffs don't say,
7 Well, look, here are these people that had information that
8 shows that you should lose your claims. They don't. And
9 when we took those depositions, what was revealed through
10 those depositions is how little evidence the Plaintiffs
11 really had. They just don't have evidence so they don't
12 bother to bring up anything from those people we deposed,
13 the people who might have had information, the union
14 business agents, the head of the union, the 30(b)(6)
15 representative. They don't bring those up so we don't need
16 to talk about those at length.

17 So moving to Mr. Siiro, with Mr. Siiro's affidavit
18 as submitted in connection with this. Again, he's never
19 identified as an expert witness. Now, they cite, and
20 reasonably so, that we knew that he was involved beforehand.
21 But the key here is really the absence of an expert report.
22 There's no expert report from Mr. Siiro.

23 And then when we get to January, I sent a
24 correspondence to opposing counsel and I say, Hey, the
25 deadline passed. I didn't get any expert report. And they

1 say, Well, we think it's premature and that motion is still
2 pending. Well, the motion was decided. They did not get
3 the relief they wanted. The scheduling order was not
4 changed, and there is no expert report in this case.

5 So they say, Well, Mr. Siiro, he is a lay witness.
6 Well, that's a funny kind of lay witness who doesn't have
7 any facts of what were actually happening at the time. It's
8 also a funny kind of lay witness who works for pay.
9 Typically that's the realm of the expert witness.

10 But even if we were to consider what he has to
11 say, it actually supports our claims. With respect to his
12 affidavit submitted in this case, what did he say? Well,
13 you know, here's some financial records I looked over. I
14 really can't come to any conclusion.

15 Again, just another example of the Plaintiffs not
16 having the evidence they need to survive our motions for
17 alter ego and to dismiss alter ego and joint venture, and
18 not having sufficient support to make their claim that these
19 nonunion entities should be subjected to the type of
20 intrusive audit that they are talking about.

21 I want to end with two things. One is the
22 history. As Mr. Revnew pointed out, when we're looking for
23 the motivations of these companies and whether they have met
24 what they need to meet -- and certainly they were able to
25 take discovery into alter ego and joint venture, it's right

1 within the orders -- what it shows is that it's not a
2 history intended to evade union obligations. It's a history
3 of new people striking out with a new venture in a new part
4 of the country doing a different type of work.

5 Just to briefly describe, because it comes through
6 in the motion papers, Alpha and C & G, they are out there in
7 the oil fields. They are constructing the new lines that
8 run right from the wells to the next point that then pumps
9 it on. What's Charps doing? Charps is taking the existing
10 lines, like the lines that run through Minnesota here that
11 are in the news, and they take those lines and they test
12 them. They do integrity digs, and they test those existing
13 lines to see whether or not there are going to be leaks to
14 make sure that there aren't problems down the road.

15 Again, as Mr. Revnew pointed out, different types
16 of work for different types of customers, often in different
17 parts of the country.

18 Thank you, Your Honor.

19 MS. COURT: Mr. Kappenman talked about traditional
20 alter-ego claims and how there can't be an alter-ego claim
21 if the union company isn't withering and dying and the
22 nonunion companies are thriving. There is nothing in the
23 alter-ego test that requires that whatsoever. What the
24 Court is to look at is whether or not the transactions
25 between the companies are at arm's length and the Trustees

1 submit to you that there's no evidence whatsoever that they
2 aren't.

3 It's clear from Magistrate Brisbois' orders that
4 additional discovery in this case is anticipated if the
5 Trustees prevail on their right-to-audit claim. The
6 Trustees have not even been allowed to audit yet, so the
7 discussion about how Mr. Siiro doesn't have an expert
8 report, it makes sense. Magistrate Brisbois said we can't
9 conduct the audit until we prevail on these threshold
10 claims.

11 Unless you have any questions, that's all I have.

12 THE COURT: No.

13 Anything further from anybody?

14 MR. KAPPENMAN: No, Your Honor.

15 MR. REVNEW: No, Your Honor.

16 THE COURT: I'll take the motions under advisement
17 and get an order out in due course. I've quit predicting
18 times for it.

19 If it's all right with the lawyers and your
20 clients, I would like to just chat with the lawyers in the
21 back room here about some issues of scheduling and that sort
22 of thing.

23 MR. REVNEW: Thank you.

24 THE COURT: The rest of you are more than happy to
25 stay here or stay in the hallways, but we will be back in 10

1 or 15 minutes at the outside.

2 Why don't you just come back this way.

3 (Court adjourned at 9:43 a.m.)

4 * * *

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6
7 I, Carla R. Bebault, certify that the foregoing is
8 a correct transcript from the record of proceedings in the
9 above-entitled matter.

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12 Certified by: s/Carla R. Bebault
13 Carla Bebault, RMR, CRR, FCRR
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